No. 43098-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Peter Davis,

Appellant.

Lewis County Superior Court Cause No. 11-1-00932-1

The Honorable Judge James Lawler

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

ASSIGNMENTS OF ERROR

1. Mr. Davis's guilty pleas were entered in violation of his Fourteenth Amendment right to due process.

2. The trial court erred by accepting Mr. Davis's guilty pleas.

3. The record does not affirmatively establish that Mr. Davis's guilty pleas were knowing, intelligent, and voluntary.

4. The record of the plea hearing does not establish a sufficient factual basis for a felony violation of RCW 26.50.110.

5. The record of the plea hearing does not show that Mr. Davis understood the alleged facts and their relationship to RCW 26.50.110.

6. The trial court erred by imposing an exceptional sentence.

7. The trial court violated Mr. Davis's state and federal constitutional right to have the jury determine every fact which increases the penalty for a crime.

8. The trial court's factual findings do not support an exceptional sentence.

9. The trial court erred by entering Finding of Fact No. I(a).

10. The trial court erred by entering Finding of Fact No. I(b).

11. The trial court erred by entering Finding of Fact No. I(c).

12. The trial court erred by entering Finding of Fact No. I(d).

13. The trial court erred by entering Finding of Fact No. I(e).

14. The trial court erred by entering Conclusion of Law No. I.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The record of a plea hearing must affirmatively establish the accused person's understanding of the law, the facts, and the relationship between the two. The record of Mr. Davis's plea

hearing does not establish a factual basis for his guilty pleas. Were Mr. Davis's guilty pleas entered in violation of his Fourteenth Amendment right to due process?

2. An accused person has a right to have the jury determine every fact which increases the penalty for a crime. In this case, the court imposed an exceptional sentence based on its own findings that the standard range was clearly too lenient, that Mr. Davis lacked remorse, and that he'd committed additional criminal acts that had not been charged. Did imposition of the exceptional sentence violate Mr. Davis's right to a jury trial and to due process under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Peter Davis was charged with several counts of Violation of a Protection Order. CP 16, 18. The state offered to recommend a standard range sentence of 60 months in exchange for a guilty plea to five counts (all felonies). RP 2.

The plea hearing was held. Judge Lawler reviewed the plea with Mr. Davis:

> THE COURT: All right. Is this your statement:
> "Between May 31, 2011 and" this looks like "July 1, 2011"?
> MR. BLAIR: Yes.
> THE COURT: "On five separate occasions I knowingly violated a domestic violence no contact order by contacting Melissa Kennedy who was the protected party in the order. I've had two prior convictions for violating a court order."
> MR. DAVIS: Yes, it is.
> THE COURT: You agree that the prior domestic violence protection order was a valid order?
> MR. DAVIS: Yes.
> THE COURT: And that you had knowledge of that order?
> MR. DAVIS: Yes.
> THE COURT: And you knowingly violated it by making the phone calls?
> MR. DAVIS: Yes, I did.
> THE COURT: State feel that's a sufficient statement?
> MR. MEYER: He indicated it's five separate occasions, correct, Your Honor?
> THE COURT: Yes, five separate occasions.
> MR. MEYER: That's fine.
> THE COURT: And those five separate occasions coincide with the date and times alleged in counts one through five, that's what you're pleading guilty to?
> MR. DAVIS: Yes.

RP 5-6.

The court accepted the plea. Statement of Defendant on Plea of Guilty, Supp. CP.

During sentencing, even though the parties had agreed to jointly recommend a standard range sentence of 60 months, the prosecutor alleged that Mr. Davis had tried to contact the victim from the jail 217 times. Mr. Davis objected to the court considering such allegations absent a real facts hearing. RP 9.

At one point, the judge believed that Mr. Davis was smiling, and asked: "Is this funny?" RP 15. Mr. Davis replied that he thought it was, and the court asked the state to establish a factual basis for aggravators. RP 15. The state then filed the police report from the incidents – all of them, not just the matters to which Mr. Davis plead guilty. Exhibits 1 and 2, Supp CP. Defense counsel stated that the defense did not agree with all of the allegations in the DCH printout or the police report, noting that Mr. Davis had only acknowledged those convictions listed in the Stipulation. Stipulation on Prior Record, Supp. CP.

The court found five bases for an exceptional sentence:

a) The defendant has extensive unscored criminal history.
b) Given the defendant's conduct, the standard range sentence would result in a sentence that is clearly too lenient.
c) The defendant's offender score is such that some of his current convictions would go unpunished.

d) The uncharged offenses in this matter are a justifiable basis for an exceptional sentence.
e) The defendant's attitude (smiling smirking and admitting that he thought the proceedings were funny) show a complete lack of remorse and an unrepentant attitude.

CP 24.

The court imposed an exceptional sentence of 90 months in prison.

CP 16. Mr. Davis timely appealed. CP 26-38.

ARGUMENT

I. MR. DAVIS MUST BE ALLOWED TO WITHDRAW HIS GUILTY PLEAS BECAUSE THEY WERE ENTERED IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). The voluntariness of a guilty plea may be raised for the first time on appeal. *State v. Walsh*, 143 Wash.2d 1, 7-8, 17 P.3d 591 (2001); *State v. Mendoza*, 157 Wash.2d 582, 589, 141 P.3d 49 (2006). The state bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wash.2d 279, 287, 916 P.2d 405 (1996).

B. The record of a guilty plea hearing must affirmatively establish an accused person's understanding of the law, the facts, and the relationship between the two.

Due process requires an affirmative showing that an accused person's guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969); *In re Isadore*, 151 Wash.2d 294, 88 P.3d 390 (2004). In order for a guilty plea to satisfy the requirements of due process, the accused must understand the law, the facts, and the relationship between the two:

> A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements... Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea.

State v. R.L.D., 132 Wash.App. 699, 706, 133 P.3d 505 (2006); *see also State v. A.N.J.*, 168 Wash.2d 91, 118, 225 P.3d 956 (2010). The factual basis for the plea must be developed on the record at the time the plea is taken. *State v. S.M.*, 100 Wash. App. 401, 415, 996 P.2d 1111 (2000). Failure to sufficiently develop facts on the record at the time of the plea requires vacation of the conviction and dismissal of the charge. *R.L.D., at* 706.

C. The record of the plea hearing does not set forth a sufficient factual basis to support felony violations of RCW 26.50.110, does not

show Mr. Davis's understanding of the alleged facts, and does not prove that he understood the relationship between the alleged facts and the crimes charged.

Violation of a No Contact Order is elevated to a felony if the accused person "has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020." RCW 26.50.110(5). Omitted from the list are anti-harassment orders issued under RCW 10.14.[1] Because omissions from a statute are deemed to be exclusions,[2] a conviction for violating a civil anti-harassment order (issued under RCW 10.14) cannot elevate a VNCO charge to a felony.

Here, Mr. Davis did not admit or stipulate to a prior qualifying violation. Instead, he orally stated that he "had two prior convictions for violating a court order." RP 6. Likewise, his written statement on plea of guilty included the following language: "I have had two prior convictions for violating a court order." Statement of Defendant on Plea of Guilty, p. 8, Supp. CP. He never specified that the prior violations related to orders

[1] Violation of such orders is criminalized by RCW 10.14.170.

[2] *See In re Detention of Martin*, 163 Wash.2d 501, 510, 182 P.3d 951 (2008) (citing the maxim *expressio unius est exclusio alterius*); *see also Adams v. King County*, 164 Wash.2d 640, 650, 192 P.3d 891 (2008).

of the type listed in RCW 26.50.110; nor did he clarify whether or not the orders were anti-harassment orders issued under RCW 10.14.

Under these circumstances, the record does not affirmatively establish that he understood the law, the facts, and the relationship between the two. *R.L.D., at* 706. Mr. Davis's guilty pleas to felony VNCO were entered in violation of his Fourteenth Amendment right to due process. *R.L.D., at* 706; *S.M., at* 415. Accordingly, his convictions must be reversed and the case dismissed. *Id.*

II. THE EXCEPTIONAL SENTENCE WAS IMPOSED IN VIOLATION OF MR. DAVIS'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

A. Standard of Review

Constitutional violations are reviewed *de novo. E.S., at* 702.

B. The trial court violated Mr. Davis's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22 by imposing an exceptional sentence without a jury determination of aggravating factors.

The Sixth Amendment guarantees an accused person the right to a trial by jury. U.S. Const. Amend. VI. Any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Washington, failure to submit such facts to the jury is not

subject to harmless error analysis. *State v. Recuenco*, 163 Wash.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. Article I, Section 21).

Whether or not a presumptive sentence is "clearly too lenient" is a fact that must be determined by a jury. *State v. Flores*, 164 Wash.2d 1, 20, 186 P.3d 1038 (2008). The "clearly too lenient" finding may be based on the offender's conduct, on unscored criminal history, or on a "free crimes" analysis; in each case, the finding must be made by the jury. *See State v. Hughes*, 154 Wash.2d 118, 134, 139-140, 110 P.3d 192 (2005) (abrogated on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

In this case, the trial judge found that "the standard range sentence would result in a sentence that is clearly too lenient." CP 24. The finding was explicitly based on Mr. Davis's conduct, and implicitly based on "extensive unscored criminal history," and "free crimes" analysis.[3] This was error: absent a waiver or a stipulation, the trial court was not permitted to make the finding. *Flores, at* 20; *See also State v. Van Buren*, 136 Wash. App. 577, 580, 150 P.3d 597 (2007).

[3] Unscored criminal conduct and free crimes analysis do not justify an exceptional sentence absent a finding that the standard range would be clearly too lenient. *Hughes, at* 134, 139-140.

The same is true of the court's findings that Mr. Davis lacked remorse and that his uncharged offenses justified an exceptional sentence. *Blakely, supra.* Mr. Davis did not stipulate to a lack of remorse or to uncharged offenses,[4] and he did not waive his right to a jury determination of those factors. CP 24.

In the absence of a jury determination that the standard range was clearly too lenient, that Mr. Davis lacked remorse, and that he had uncharged misconduct justifying an exceptional sentence, the sentence imposed violated Mr. Davis's right to a jury trial under the state and federal constitutions. *Flores, supra.* The sentence must be vacated, and the case remanded to the trial court for sentencing within the standard range. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Davis's convictions must be reversed and the charges dismissed. In the alternative, his exceptional sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on April 24, 2012,

[4] Indeed, his attorney objected when the prosecutor mentioned the uncharged misconduct. CP 9, 17.

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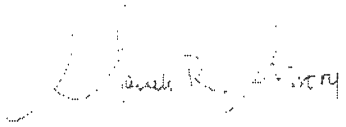

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 24, 2012.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

April 24, 2012 - 4:11 PM

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